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NO. 85-2145

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THOMAS ANTHONY MARICLE, Petitioner

v.

UNITED STATES OF AMERICA

REPLY TO MEMORANDUM FOR THE

UNITED STATES IN OPPOSITION

STUART I. HYMAN
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TABLE OF AUTHORITIES

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United States v. Crozier,
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With regard to Point B of the Petition for Writ of Certiorari, the Petitioner would stand upon the cases cited for the proposition that a Protective Sweep Search was unwarranted in the instant case. Agent Stevens, in his surveillance of the property never obtained any license tag numbers and as such, did not know if the vehicles belonged to the same person.(1 Tr. 38.) He stayed in the area for only thirty (30) minutes and saw no one on the premises.(1 Tr. 38,) 40. He also saw no evidence that the vehicles were operable. (1 Tr. 38.) At the time of his observations, he had received no other information of more than one person being on the premises. (1 Tr. 38.) Two women in a pickup truck confirmed that only one man named Tom lived on the premises.(1 Tr. 39.)

Even though the juveniles had told the Officers about guns being in a shed on the premises, the Officers had no knowledge of

guns being located in the mobile home itself (1 Tr. 41, 54). They also had no information that the individual, Tom, who supposedly occupied the premises, possessed guns nor did they have any information concerning associates of his who might possess guns. (1 Tr. 42, 43). In addition, Agent Stevens had not seen any indications of criminal activity on the premises.(1 Tr. 44.) The only information provided by the juveniles that could be corrorborated would be the location of the premises. (1 Tr. 44, 45). Both Investigator Jenkins and Agent Stevens admitted that they had merely a suspicion that others were on the premises but that there was not a probability of others being on the premises. (1 Tr. 60, 157). Agent Stevens went so far as to testify that he had no hard, concrete facts that others were in the mobile home at the time of the execution of the February 20, 1985 Search Warrant. (1 Tr. 60).

Investigator Jenkins stated that he had no information that the occupants of the premises were armed or dangerous. (1 Tr. 158).

The government also attempts to sustain the search of the mobile home in the instant case based upon the odor of ether. Prior to their application for the Search Warrant of February 20, 1985, the Agents had been aware for at least nine (9) hours that there was potentially an odor of ether present at the mobile home. In fact, the two (2) juveniles had told them about the ether in their statements. (1 Tr. 52, Pet. App. B-15-22). Once again, the police created their own exigent circumstances by not making application for a Search Warrant for the mobile home in order to obtain judicial approval to investigate the odor of ether.

The government's argument that the public's safety was in danger also holds no water in that the premises were under

observation by the police from 6:00 A.M. until the execution of the Search Warrant at approximately 2:30 P.M. and there was no explosion (1 Tr. 51). In addition, the so called ether danger had been present since February 7, 1985, the date the juveniles allegedly broke into the trailer and smelled ether and yet there was still no explosion. Finally, in this alleged dangerous situation, the police took the time to have a S.W.A.T Team briefing session before the execution of the February 20, 1985 Warrant. (1 Tr. 155). It would be submitted by the Petitioner that the alleged immediacy of the situation upon which the police allegedly acted was more an act of speculation and smoke screen than fact.

The alleged need to turn the electricity off in the lab for safety's sake is directly refuted by the fact that the chemist brought in by the Drug Enforcement Administration, Harold Hannel, determined

that there was no danger and in fact, had the electricity turned back on. (1 Tr. 114). It should also be pointed out that the Agents' decision to enter the mobile home, in order to protect the public safety, was made only after the initial illegal entry into the trailer by the S.W.A.T. Team under the auspices of a Protective Sweep Search and was thus, "fruit of the poisounous tree". (2 Tr. 10). In United States v. Impink, 728 Fed.2d. 1228, (9th Cir. 1984), the Court stated on Page 1231

> "To hold that the mere presence of flasks and beakers consitutes an exigent circumstance would be to hold every chemical laboratory in the country open to warrantless searches. We have declined to do this before. See United States v. Crozier, 674 Fed.2d. 1293, 1298-99 (9th Cir. 1982) and we decline to do so now."

In the instant case, the police had no indication at the time they initially approached the mobile home that there was a

functional illegal labratory present therein. At best, the police after the entry into the mobile home, smelled the odor of a legal chemical, ether. As such, there existed no exigent circumstances to enter the mobile home. See United States v. Tate, 694 Fed.2d. 1217, (9th Cir. 1982).

Therefore, the entry into the mobile home, which was not authorized in the February 20, 1985 Search Warrant cannot be legally sustained. This is especially so in light of the fact that the only gun alleged to have ever been in the mobile home was removed by the juveniles themselves before the issuance of the Search Warrants. (Pet. App. C-23).

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